WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
DECEMBER, 2009

Please note, cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Dane
Fond du Lac
Sheboygan
St. Croix

TUESDAY, DECEMBER 1, 2009

9:45 a.m.	06AP948	Darnell Jackson v. Daniel Buchler
10:45 a.m.	09AP3-CR	State v. Travis Vondell Cross
1:30 p.m.	08AP755-CR	State v. Joshua D. Conger

WEDNESDAY, DECEMBER 2, 2009

9:45 a.m.	08AP1684	Milwaukee Symphony Orchestra v. Dept. of Revenue

TUESDAY, DECEMBER 8, 2009

9:45 a.m.	{08AP3065 {08AP3066 {08AP3067	Sheboygan County DH&HS v. Tanya M. B.
	{09AP136 {09AP137 {09AP138	Sheboygan County DH&HS v. William L.
10:45 a.m.	07AP2771-D	Office of Lawyer Regulation v. Harvey J. Goldstein

In addition to the cases listed above, the following case will be decided by the court based upon the submission of briefs without oral argument:

05AP1978-D Office of Lawyer Regulation v. Gary R. George

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 1, 2009
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Dane County Circuit Court decision, Judge Maryann Sumi, presiding.

2006AP948 Darnell Jackson v. Daniel Buchler and Matthew Frank

This prison discipline case stems from a riot at the New Lisbon Correctional Institute (NLCI) on Nov. 11, 2004. Darnell Jackson claims his rights of due process and equal protection were violated because he was not able to obtain a copy of a videotape he contends would be exculpatory evidence, and because a prison official who interviewed him about possible involvement in the riot also served on a the inmate's disciplinary panel.

Some background: Prison officials found that Jackson had violated prison rules by inciting a riot at, and they imposed disciplinary sanctions against him. The riot resulted in injuries to several correctional staff members.

According to written statements provided by two confidential informants, the informants saw Jackson huddle with three inmates in a hallway at the NLCI. One of the informants stated that Jackson told the other three inmates that they knew what needed to be done.

Jackson was allegedly a high-ranking member of the Vice Lords gang and was instructing other gang members to assault security officers in retaliation for a beating that those officers had inflicted on another gang member.

Shortly after Jackson was seen huddling with the other inmates, those inmates were seen attacking four security officers near their desk in the relevant unit of the prison. Jackson was not alleged to have participated directly in the riot as he went back into the prison barber shop where he was giving someone a haircut.

Prison officials lodged a conduct report against Jackson, charging him with inciting a riot, contrary to Wis. Admin. Code § DOC 303.18, and group resistance and petitions, contrary to Wis. Admin. Code § DOC 303.20. Jackson contended that he never met with or directed the individuals who participated in the riot.

Evidence provided to the disciplinary committee included statements by various inmates, statements given by the two confidential informants, a conduct report by a Department of Corrections (DOC) officer assigned to gang activity, and other incident reports. Although the disciplinary committee's decision initially indicated that it had also reviewed and relied on surveillance videotape evidence, the reference to videotapes was subsequently removed after Jackson appealed.

In circuit court, Jackson argued that prison officials should have produced a surveillance videotape of the area where he had allegedly met with the other inmates prior to the riot. Jackson argued that if the videotape had been given to him and he had been able to show it to the disciplinary committee, it could have resulted in a finding of no violation.

The circuit court rejected as moot Jackson's arguments about the videotape because the prison disciplinary record reflected that the disciplinary committee had not considered any videotape. The circuit court also rejected Jackson's claim that a lieutenant involved in the investigation should have been barred from serving on the disciplinary committee.

Jackson appealed, and the Court of Appeals determined that there was no attempt by Jackson to argue the lieutenant’s involvement in the investigation had been substantial and that Jackson had not proven that he was legally entitled to obtain videotape evidence from prison officials.

The Supreme Court will consider, among other things, whether Jackson exhausted all of his possible remedies in the prison disciplinary system before seeking judicial review, whether the lieutenant properly served on the disciplinary committee, and whether an inmate has a right to obtain exculpatory evidence from prison officials during a prison disciplinary proceeding.

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 1, 2009
10:45 a.m.

In this bypass of the District III Court of Appeals (Headquartered in Wausau), the Supreme Court reviews of a decision by St. Croix County Circuit Court Judge Eric J. Lundell. A party may ask the Supreme Court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.

2009AP3-CR State v. Travis Vondell Cross

In this case, the Supreme Court is asked to decide how the law should apply to a defendant who entered a guilty plea after being wrongly informed about the potential maximum sentence for his crime.

Some background: In December 2005, Travis Vondell Cross was charged with first-degree sexual assault of a child under the age of 13. He subsequently entered a guilty plea to a reduced charge of second-degree sexual assault of a child.

The trial court engaged in a personal colloquy with Cross and accepted the guilty plea. It is undisputed that at the time of the plea, the defendant misunderstood, and was misinformed by both the trial court and defense counsel, that he faced 40 years imprisonment, including 25 years initial confinement. In fact, however, he faced maximum imprisonment of 30 years, including 20 years initial confinement. Cross was sentenced to 25 years initial confinement and 15 years extended supervision, to be served consecutively to an ongoing prison sentence in Minnesota.

The trial court denied Cross' motion for plea withdrawl but sentenced him to 20 years initial confinement plus 10 years of extended supervision to be served consecutive to the Minnesota prison sentence.

The state, which asked the Supreme Court to bypass the Court of Appeals, contends there is a conflict in previous Court of Appeals' decisions that only the Supreme Court can resolve. The state says a defendant is not automatically entitled to withdraw a plea, based on a mistaken belief, at the time of a guilty plea is entered, that he or she faced a greater potential punishment that he or she actually faced. Withdrawl of the plea is not warranted in this case to correct a manifest injustice, according to the state. Cross contends the trial court erred by not allowing him to withdraw a guilty plea. The plea was not entered knowingly voluntarily and intelligently as required by Wis. Stat. § 971.08 (1) (a). He contends the case is appropriate for the Court of Appeals to decide, based on previous decisions.

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 1, 2009
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District II (District IV Court of Appeals' judges presiding). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Fond du Lac County Circuit Court, Judge Peter L. Grimm, presiding. District II Court of Appeals is headquartered in Waukesha.

2008AP755-CR State v. Conger

This certification raises novel issues regarding circuit courts' supervisory role in accepting or rejecting plea agreements.

Some background: Joshua Conger was charged with possession with intent to deliver more than 200 grams, but less than 1,000 grams of marijuana, within 1,000 feet of a park and possession of drug paraphernalia.

Police found 48 individually wrapped baggies of marijuana, totaling 774 grams, hidden behind a ceiling tile in the home the defendant shared with his girlfriend and a third person.

After the defendant was bound over for trial, the parties negotiated a plea agreement under which the felony count would be dropped in favor of pleas of guilty or no contest to three misdemeanor counts of possession of marijuana (THC). The drug paraphernalia charge would be dismissed but available as a read in offense for sentencing. The state agreed to recommend two years probation, sentence withheld, conditioned in part on a 90-day jail term.

The trial court refused to accept the plea agreement, based on the public interest. The court stated that based on all the facts of the case, including the large quantity of marijuana packaged for resale, that the offense was too serious to be reduced to misdemeanors. The public interest was best served by maintaining the case as a felony, the court determined.

The Court of Appeals granted the defendant's motion for leave to appeal. The state and the defendant are the co-appellants in the appeal, with the trial court, Fond du Lac County Circuit Court Judge Peter L. Grimm, the respondent.

Judge Grimm argues that this case is merely a review of whether the circuit court properly exercised its discretion and the law is well settled that the circuit court may take the public interest into consideration when deciding whether to accept or reject a plea bargain.

The state acknowledges that a trial court has the authority to reject a plea agreement in the public interest but argues that the trial court in this case erred because it failed to give proper deference to the prosecutor's reasonable exercise of discretion in entering into the plea agreement. The state argues so long as the prosecutor has identified legitimate reasons for entering into a plea agreement, the trial court may not substitute its view of the public interest for that of the prosecutor unless the prosecutor has wholly

failed to consider the interests of the victim or victims, if any, or has shown some improper discriminatory motive.

The Court of Appeals asks the Supreme Court to consider three questions:

- What is the trial court's scope of review when deciding whether to accept or reject a plea agreement?
- What factors must a trial court consider when determining whether a plea agreement is in the public interest?
- Whether a trial court may take into account the view of law enforcement when considering the public's interest in a plea agreement.

WISCONSIN SUPREME COURT
WEDNESDAY, DECEMBER 2, 2009
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge Maryann Sumi, presiding. In reversing the circuit court decision, the Court of Appeals' affirmed a Wisconsin Tax Appeals Commission decision.

2008AP1684 Milwaukee Symphony v. DOR

This sales tax case examines whether the term "entertainment," as used in Wis. Stat. § 77.52(2)(a)2, includes the admission to a symphonic event, such as a Milwaukee Symphony Orchestra ("MSO") performance.

Some background: MSO is a professional, full-time orchestra incorporated as a not-for-profit corporation and presents 100 to 150 concerts each year. MSO filed an amended sales tax return, claiming a refund of $719,456.69 in sales tax that it had paid on its sales during 1992 through 1996. MSO stated that its symphony concerts were primarily educational or charitable, and therefore, not taxable under the statute.

MSO contends that because the Tax Appeals Commission ("the Commission") has previously excluded events at Circus World Museum and the Experimental Aircraft Association from the definition of an "entertainment" event, the term should be narrowly construed to exclude a symphonic performance with a significant educational component.

The Commission rejected the argument and determined that the concert performances were taxable.

The circuit court gave deference to the Commission's decision, while concluding that the Commission erred in distinguishing between education and entertainment because § 77.52(2)(a)2. does not use the term "educational" or "non-educational."

The circuit court remanded to the Commission to permit the Commission to develop a standard to determine whether an event is "entertainment" within the meaning of § 77.52(2)(a)2.

MSO appealed and the Department of Revenue cross-appealed.

The Court of Appeals affirmed the Commission's decision, determining that the Commission correctly and reasonably reconciled three previous cases involving questions surrounding sales taxes on certain types of organizations.

MSO argues:

1. The court of appeals' "due deference" to the Commission conflicts with existing law;
2. Contrary to the Commission's decision, ambiguous statutes are to be resolved in the taxpayer's favor;
3. The Commission's refusal to consider other state and federal laws interpreting § 77.52(2)(a)2. conflicts with existing law;
4. The Commission's rejection of MSO's expert witness's testimony regarding the nature of the concerts conflicts with existing case law;

5. The Commission is not bound by the Department's Rule 11.65; and

6. The Commission's definition of “education” in applying § 77.52(2)(a)2. conflicts with existing law and is unsupported.

The Department of Revenue contends the issue here is primarily a fact question, not a question of statutory interpretation. It says that the Commission's analysis and evaluation of the evidence supports its determination that MSO's concerts are primarily entertainment. Testimony before the Commission reinforces its argument, the Department of Revenue also contends.

A decision by the Supreme Court could clarify the term “entertainment” as used in § 77.52(2)(a)2 and potentially affect sales tax revenue and arts organizations statewide.

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 8, 2009
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Sheboygan County Circuit Court decision, Judge Gary J. Langhoff, presiding.

2008AP3065-67/ 2009AP136-38 Sheboygan Co. DHHS v. Tanya M.B. and William S.L.

This termination of parental rights (TPR) case examines whether a trial court order that does not specify services for children, aside from inherent supervision by the county department of human services, is invalid for failing to comply with Wis. Stat. 48.355.

Some background: William and Tanya were the parents of three children under the age of six. Both parents had histories of drug abuse and unsuccessful treatment attempts. A day after William started a jail sentence in Milwaukee in February 2004, Tanya drove 50 miles to Milwaukee in freezing rain with the children to purchase heroin. She overdosed in the parking lot of a Glendale fast-food restaurant, leaving the car's motor running. The children were "distraught" and had to be cared for by police while Tanya was transported to the hospital, unconscious, and they waited for extended family to arrive.

A CHIPS (Child in Need of Protective Services) petition was filed, and on March 25, 2004, the trial court signed a one-year dispositional order placing the children under supervision of the Sheboygan County Department of Health and Human Services. The children were placed with Tanya and William because they were then living with Tanya's mother.

On December 17, 2004, the protective order was changed to formally place the children with Tanya's mother. The children remained under court protection for another three years, which, according to the department, were, "for William and Tanya, a revolving door of jail, prison, probation revocation, alternatives to revocation, drug abuse treatment and counseling, and repeated relapses."

On March 7, 2008, the department filed petitions for the involuntary termination of the parental rights of William and Tanya, based on the underlying CHIPS dispositional orders entered on March 25, 2004. The TPR petitions cited William's and Tanya's failure to meet the conditions set forth in the CHIPS dispositional orders. The March 2004 dispositional orders set forth numerous conditions to be met for the return of the children; however, the court did not order any services to be provided to the child and family as required by § 48.355(2)(b)1.

A jury ultimately found that the county human services department had met its burden as to the elements underlying grounds for termination, including that it had made a reasonable effort to provide the services ordered by the court.

William and Tanya filed motions, asking the court to dismiss the cases based on the defect in the 2004 CHIPS order. The trial court denied the motions to dismiss on the

grounds that the "defects" in the orders had not been timely raised. Both parents appealed.

The Court of Appeals reversed, concluding Wis. Stat. § 48.355 requires the trial court to order the Department to provide specific services in a CHIPS order.
A decision by the Supreme Court could have substantial impact, not only on this case, but potentially statewide as there are likely many CHIPS dispositional orders that don't itemize services a county must provide. Such a decision also may resolve potentially conflicting Court of Appeals' decisions.

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 8, 2009
10:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow Rules of Professional Conduct developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

2007AP2771-D OLR v. Goldstein

Atty. Harvey J. Goldstein was admitted to the practice of law in Wisconsin on May 23, 1977. He practices in Milwaukee. He has not been subject to previous discipline.

The OLR filed a 24-count disciplinary complaint alleging misconduct due to Goldstein's trust account violations and conversion of nearly $70,000 in three probate matters (counts one through 20). The complaint also alleges misconduct with respect to Goldstein's failure to pay and communications with a third party, Ronald Russo (Counts 21 through 24).

The OLR sought the revocation of Goldstein's license.

Goldstein admitted counts one through 17, 19, and 20, and denied counts 18, and 21 through 24. He reserved the right to contest the complaint to mitigate the severity of the sanction.

At the Nov. 19, 2008, hearing before Referee John F. Fiorenza, the parties agreed Goldstein had fully repaid his trust account before the OLR had initiated its investigation (with the exception of paying interest due the estates). Referee Fiorenza concluded Goldstein violated counts one through 20 and count 24. He recommended that Goldstein's license be suspended for one year and that he pay the entire costs of the disciplinary proceeding, as well as the interest the parties stipulated is due to two probate estates.

The OLR appeals, presenting two issues:

1. Did Goldstein communicate about the subject of representation, through the acts of another, with a party represented by counsel, in violation of SCRs 20:4.2 and 20:8.4(a) as charged in count 23?

2. What is the appropriate level of discipline to impose for Goldstein's professional misconduct?

Count 23 alleges that by communicating with Russo, a party represented by counsel, through an employee of Russo's and through one of Goldstein's own employees, after Russo's counsel had informed Goldstein in writing that all communications were to go through counsel, Goldstein violated former SCR 20:4.2 through the acts of another, and therefore violated SCR 20:8.4(a).

With respect to count 23, the referee found that Russo continued to accept work assignments from Goldstein after he filed a grievance with OLR, and it was Russo's

decision to continue the service to Goldstein and it was necessary for Russo's employees to talk to Goldstein.

The referee concluded the “communication to Russo's employee under [their] working arrangement does not rise to a communication with a party who was represented by an attorney. There was no discussion about the pending case in which the attorney was representing Russo,” according to the referee. Based on these findings, the referee concluded that counts 21 through 23 were not proved.

The OLR challenges the referee's conclusion as to count 23 and the sanction recommendation. The OLR argues revocation is appropriate regardless of this court's determination with respect to count 23.

The OLR contends the referee's finding that Goldstein did not have a discussion with Russo's employee concerning money owed to Russo is erroneous.

The OLR argues that due to the severity of Goldstein's misconduct in converting over $69,000 from three of his clients' estates during 18 months, the appropriate sanction is revocation.